80-2090

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ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

WILLIAM GLENN PRICHARD
and BRIAN DE PALMA,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

MAX P. ENGEL, ESQ.
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Miami, Florida 33125
TEL: 305/325-1810

COME NOW the Petitioners, WILLIAM GLENN PRICHARD and BRIAN DE PALMA, by and through their undersigned attorney and pursuant to the Supreme Court Rules petition this Honorable Court for issuance of a Writ of Certiorari in this cause. In support thereof Petitioners would show as follows:

1. The Petitioners seek review of *United States v. Prichard and De Palma*, _ F.2d _ (10th Cir. 1981), Case No's 79-2280, 2281, decided April 1, 1981, rehearing en banc denied May 11, 1981.

2. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

A. Petitioners were convicted of Possession With Intent to Distribute Cocaine in violation of 21 U.S.C. §841(9)(7) and 18 U.S.C. §2 on November 9, 1979. The judgment was affirmed by the Court of Appeals for the Tenth Circuit on April 1, 1981, rehearing en banc denied on May 11, 1981.

3. The constitutional provision involved herein is the Fourth Amendment to the United States Constitution. (see appendix for text.)

4. The questions presented for review by this Honorable Court are as follows:

WHETHER THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS WHERE THE INITIAL STOP OF THE

PETITIONERS VEHICLE WAS A ROADBLOCK STOP OF ADMITTEDLY LESS THAN ONE HUNDRED PERCENT GOVERNED ONLY BY THE UNFETTERED DISCRETION OF THE OFFICERS IN THE FIELD CONTRARY TO THIS COURTS HOLDING IN *DELAWARE V. PROUSE* 440 U.S. 648 (1979) AND WHERE THE SUBSEQUENT ALLEGED CONSENT SEARCH OF THE PETITIONER'S VEHICLE WAS MADE WITHOUT INFORMING PETITIONERS OF THEIR *MIRANDA* RIGHTS OR OF THEIR RIGHT TO REFUSE TO CONSENT TO THE SEARCH.

5. **The Facts of the Case:**

On July 29, 1979 Officer Christian of the New Mexico State Police was asked by Officer Faison to hold a roadblock with him. According to Officer Faison the purpose of the roadblock was to enforce the laws of the State of New Mexico particularly those relating to drunk drivers and stolen vehicles, license and registration enforcement were not paramount in the officers' plans.

During the course of the roadblock semi-trucks were not stopped and all traffic was allowed to proceed unstopped when, in the officers sole discretion, it was felt traffic was backing up. The officers received no directions from superiors regarding which vehicles to stop or when to lift the roadblock.

At about 2:00 P.M. the Petitioners' Ford Bronco arrived at the site of the roadblock located on an Interstate Highway and it was stopped by Officers Faison and Christian. The officers then had Petitioners park their

vehicle on the median while a computer check was done as the officers were unsatisfied with the registration and ownership information given them by Petitioners.

Officer Faison then asked for and was given permission to look in the vehicle's glove compartment, after doing so he observed a California license plate behind the passenger seat and he also noticed a strong odor, like a room deodorant, in the vehicle. Officer Faison then asked Prichard for the key to the vehicle's tailgate which Prichard said he didn't have. Officer Faison then took the ignition key and tried to open the tailgate but it would not go in the lock and there appeared to be a key broken off in the lock. Faison then asked for permission to search the vehicle, in response Prichard entered the vehicle and removed all of his and DePalma's belongings throwing them on the median, he then told the officers they could go through the personal belongings.

Although denied completely by Petitioners, Officer Faison testified that Prichard said he could then search the interior of the vehicle. Petitioners testified that when he asked they refused permission but Faison then yelled at Christian that he had been given permission to search the vehicle in spite of Petitioners refusals. Faison then entered the vehicle and observed a spilt can of deodorant and a loose panel on the rear inside of the vehicle with several screws laying on the floor of the vehicle. Faison then reached down behind the loose panel and felt plastic wrapped bricks. He then ordered Christian to place the Petitioners under arrest. Returning to the vehicle he removed a brick and opened the package which later proved to be cocaine.

6. **Argument:**

It is Petitioners' contention herein that the Court of Appeals erred in refusing to reverse the trial court's failure to suppress the contraband found in the Petitioners' vehicle.

The first error results from the Court of Appeals faulty application of this Honorable Court's holding in *Delaware v. Prouse* 440 U.S. 648 (1979). The Court of Appeals ruled that roadblocks of less than one hundred per-cent are constitutionally permissable. It based its holding on that portion of this Honorable Court's decision in *Prouse* which says;

> "This holding does not preclude the States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock stops is one possible alternative." *Prouse* at 663

The Court of Appeals then engages in large scale intellectual sleight of hand to transform the facts of the case at bar to fit the exception set forth in the hereinbefore quoted dicta from the *Prouse* opinion. A stop totally without any articulable suspicion and at a roadblock where it is freely admitted that much less than one hundred per-cent of the vehicles are stopped is suddenly brought under an exception specifically labelled one hundred per-cent roadblocks and the unfettered exercise of discretion by the officers in the field is ignored.

The true holding in *Prouse* is clear.

> ". . . except in those situations in which there is at least articulate suspicion that a motorist is unlicensed or that an automobile is not registered or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment . . . . we hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." *Prouse* at 1400.

Yet, that is exactly what the Court of Appeals has sanctioned herein. The Petitioners were exercising their right to travel on a public, Inter-State highway. They were stopped by police officers who were operating totally at their own discretion without any supervision from higher authority. They were stopped not for purposes of license and registration enforcement as permitted at a one hundred per-cent roadblock under *Prouse* but by officers seeking to enforce the general laws of New Mexico, specifically auto theft and drunk driving statutes. Then following this unlawful display of "force majeure" the alleged consent of Petitioners to a search of their vehicle is obtained without any intervening warning of their *Miranda* rights or their right to refuse to consent for such a search.

The key element in an analysis of this Court's decision in *Prouse* is clearly the unbridled exercise of discretion as to who is stopped and who isn't, by officers in the field. The *Prouse* decision clearly sets forth the fact that it is just such discretion which is the evil sought to be eradicated by the holding therein.

If allowed to stand the Court of Appeals' decision in the case sub judice is an explicit repeal of this Honorable Courts holding in *Prouse* and will create a grave dichotomy between the rest of the Circuits which have followed the principles of one hundred per-cent roadblocks and restrained police discretion and the Tenth Circuit which now holds that no restraint of the officers discretion in the field is necessary and that significantly less than one hundred per-cent roadblocks are permissible.

If this Court holds that the stop herein was impermissible pursuant to *Prouse*, then the subsequent alleged consent search cannot be upheld because the Court must in such event indulge every reasonable presumption against the validity of a consent search after an illegal stop. *United States v. Abbot* 546 F.2d 883 (10th Cir. 1977). In fact, where, as here, no *Miranda* warnings or notice of right to refuse consent were given between the illegal stop and the subsequent alleged consent search, no alleged consent search has ever been upheld, there having been no attenuation of the taint inflicted by the original illegal stop. *Bretti v. Wainwright* 439 F.2d 1042 (5th Cir., 1971), *United States v. Troutman* 590 F.2d 604 (5th Cir. 1979).

CONCLUSION

Therefore Petitioners pray this Honorable Court to take jurisdiction of this cause and to issue a Writ of Certiorari to the Court of Appeals for the Tenth Circuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served upon Solicitor General, Department of Justice, Washington, D.C. 20530 and R.E. Thompson, United States Attorney, P.O. Box 607, Albuquerque, New Mexico 87103 by mail this 9 day of June, 1981.

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/s/ MAX P. ENGEL, ESQ.
MAX P. ENGEL, ESQ.

Appendix

Dominick Angel BRETTI,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Director,
Division of Corrections, State of Florida
Respondent-Appellee.

No. 29811
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Feb. 24, 1971.

Rehearing Denied May 4, 1971.

State defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., entered a judgment denying relief and the defendant appealed. The Court of Appeals, Goldberg, Circuit Judge, held, inter alia, that record in federal habeas corpus proceeding showing that defendant was arrested and taken to his apartment by police, who warned him that he need not consent to any search, that anything found could be used against him, and that he had a right to consult with an attorney, established that the defendant voluntarily consented to search of apartment by police who discovered therein no fruits of robbery but did discover a driver's license which has been used to procure rented automobile

used in robbery, as any consent was untainted by the possible illegality of prior arrest.

Affirmed.

1. Appeal and Error —826

Merits of appeal from denial of state prisoner's petition for federal writ of habeas corpus were such as not to require oral argument and case was placed on summary calendar and the clerk was directed to notify the parties in writing. U.S.Ct. of App. 5th Cir. Rule 18, 28 U.S.C.A.

2. Habeas Corpus —85.5(2)

Record in federal habeas corpus proceeding showing that defendant was arrested and taken to his apartment by police, who warned him that he need not consent to any search, that anything found could be used against him and that he had a right to consult with an attorney, established that the defendant voluntarily consented to search of apartment by police who discovered therein no fruits of robbery but did discover a driver's license which had been used to procure rented automobile used in robbery, as any consent was untainted by the possible illegality of prior arrest. 28 U.S.C.A. §2254.

3. Searches and Seizures —7(28)

Consent to search is not to be lightly inferred where it is contended that consent is the product of an illegal arrest.

4. Searches and Seizures —7(27)

While police request for consent of defendant, who had been arrested, to search of his apartment was phrased in terms of a search for furs and jewels taken from robbery, that request could not be reasonably construed as disabling police from seizing driver's license used to procure a rented automobile used in robbery, since there was reason to believe that such seizure would aid in defendant's conviction for robbery as there was a nexus between crime for which evidence was sought and the driver's license bearing the name of a third person.

5. Searches and Seizures —3.3(4)

Police who were in defendant's apartment, pursuant to his consent, to search for furs and jewels taken in robbery were entitled to seize a driver's license in the name of a third person which was in plain view.

6. Criminal Law —622(2)

No abuse of discretion was shown in denying appealing defendant a severance from joint trial with two other defendants from whom evidence was seized which was introduced against all three defendants, where appealing defendant was able to examine codefendants with reference to their alleged consents to searches at a hearing held on defendant's motion to suppress, despite fact that the codefendants chose not to testify at trial proper.

7. Criminal Law —736(1)

It is for the court and not the jury to decide whether evidence has been illegally seized.

8. Criminal Law —394.5(3)

Appealing defendant involved in a joint trial with two codefendants lacked standing to object to the introduction of evidence seized as a result of the consent of the other two codefendants to searches which were not directed at the appealing defendant.

Dominick A. Bretti, pro se.

Earl Faircloth, Atty. Gen., Tallahassee, Fla., Arden Siegendorf, Melvin B. Grossman, Asst. Attys. Gen., Miami, Fla., for respondent-appellee.

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

GOLDBERG, Circuit Judge:

This appeal is taken from an order of the district court denying the petition of a Florida state convict for the writ of habeas corpus. Appellant, tried with two co-defendants, was convicted by a jury of robbery and was sentenced to fifteen years imprisonment. Conviction was affirmed in Bretti v. State, Fla. App.1966, 192 So.2d 6, cert. denied, Fla. 1967, 201 So.2d 459, cert.

denied, 1967, 390 U.S. 944, 88 S.Ct. 1023, 19 L.Ed.2d 1132.

In his habeas petition filed below appellant presented the following allegations which he had argued on direct appeal to the state court; that the trial court wrongfully admitted evidence obtained by an illegal search and seizure, and that the trial court erred in denying his motion for severance. The district court denied relief without holding an evidentiary hearing, finding that the hearing held by the state trial court on appellant's motion to suppress was complete and fair, that the state court's findings were correct, and that the trial judge did not abuse his discretion in denying a severance. We affirm.

Appellant first argues that the state trial court committed constitutional error by admitting into evidence the fruits of an illegal search. In Miami Shores, Florida, on February 9, 1965, at about 9:00 P.M., a Dr. Traub and Mrs. Fritzel, his house guest, were robbed at gunpoint of their jewelry and furs. Police officers, who were en route to the Traub residence in answer to a disturbance call, noticed a Falcon automobile with two passengers in the area. After ascertaining that a robbery had taken place, a search for the Falcon automobile commenced. The car was subsequently discovered to be in the parking lot of the Apache Motel.

Later that same evening the police learned from an informant that three men had been seen getting out of a Cadillac automobile in the same parking lot and leaving in a car resembling a Falcon. Sometime later, according to the informant, the Falcon returned, and

three men removed some bundles from its trunk and placed them in the trunk of the Cadillac. The men then departed from the lot in the Cadillac.

After checking the license number supplied by the informant, the police ascertained that the Cadillac was registered to Anthony Antone. Although they had neither an arrest warrant nor a search warrant, the police went to arrest Antone at his apartment at approximately 5:30 or 6:00 A.M., on the morning of February 10. When no one responded to the officers' knocks, they opened Antone's closed but unlocked door and entered his apartment. A search revealed that no one was inside. The police thereupon secreted themselves in the apartment and remained therein until approximately 11:00 A.M., when Antone, Louis Ghelfi, and appellant Bretti entered the premises. The three men were immediately placed under arrest.

Following the arrests one of the police officers took Ghelfi outside, and, according to that officer's testimony, Ghelfi consented to a search of his car, also a Cadillac automobile. Under the driver's seat the officer discovered a brown paper bag containing jewelry. Officers then escorted Ghelfi to his home where again they testified that he consented to a search of the premises. There the officers found two pistols.

Meanwhile Antone was taken to his car where, the officers testified, he consented to a search. In the trunk the police found a pillow case containing furs. The automobile was again searched the next day without a warrant or additional consent, and several guns were discovered.

Similarly, police officers Bishop and Ford, who arrived at Antone's apartment subsequent to the arrests, took appellant Bretti to his car. These officers testified that appellant consented to a search of the car, but that no evidence was discovered. The officers then took appellant to his home. Once again they testified that they sought appellant's consent to search for furs and jewels. According to their testimony, the officers warned appellant that he had a right to counsel and anything they discovered could be used against him. Appellant allegedly responded that he had nothing to hide and opened the apartment door with his own keys. While the police found no furs or jewels, they did discover in plain view on top of a small refrigerator a driver's license in the name of Joseph Annello. In response to questions as to who owned the license, how it got there, and why it was there, the appellant disclaimed all knowledge of the license.

Upon investigation it was determined that the license was used as identification to rent a Falcon automobile, and the clerk at the rental agency identified appellant as the man who rented the car on the afternoon of February 9, 1965.

Appellant argues that the introduction of the driver's license into evidence was error. He contends (1) that he did not consent to a search of his apartment; (2) that if he did consent, the consent was vitiated because it was predicated upon an illegal arrest; and (3) that even if the consent was not invalid, it did not extend to a general exploratory search for articles other than furs and jewels.

[2] After a full and fair hearing on appellant's motion to suppress, the state trial court found that appellant freely and voluntarily consented to a search of his apartment, and this ruling was affirmed on appeal. We find the conclusions of the state courts fairly supported by the record and hold that the district court below was not clearly erroneous in adopting those determinations as its own. 28 U.S.C.A. §2254; Townsend v. Sain, 1963, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770; *see* Tyler v. Beto, 5 Cir. 1968, 391 F.2d 993; Landsdown v. United States, 5 Cir. 1965, 348 F.2d 405.

[3] In reaching this conclusion we of course bear in mind that "consent to a search is not lightly inferred, but must be shown by clear and convincing evidence * * * Any consent must be voluntary and uncoerced, either physically or psychologically." Phelper v. Decker, 5 Cir. 1968, 401 F.2d 232, 236. We should be at least as alert where it is contended that a consent is the product of an illegal arrest. *Cf.* Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441. Nevertheless, a waiver of constitutional rights is possible following an illegal arrest. The appropriate test was stated in *Phelper:*

> "If it were determined that the consent given by Appellant was secured through an exploitation of the illegal arrest, then such consent along with the photographs secured in the search resulting from the consent would undoubtedly be fruit-of-the-tree. But not every piece of evidence uncovered after an illegal arrest is automatically excluded. Rather, the question to be asked each time is ' "[W]hether,

> granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).' Wong Sun v. United States, 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455. * * *" 401 F.2d at 236-237 (footnotes omitted).

We need not here decide whether the arrest of appellant was legal or not,[1] for, even if illegal, we think that the subsequent consent was untainted under the reasoning of *Phelper*. First, there is no evidence that appellant was subjected to any coercive tactics in order to elicit his consent. The duress, if any, did not go beyond that inherent in any arrest. Second, and perhaps most important, there were significant "intervening occurrences" between the alleged illegal arrest and the acquisition of the evidence sought to be used. Phelper v. Decker, *supra*, 401 F.2d at 237. Thus, the evidence would support a conclusion that appellant was advised that he need not consent, that anything found could be used against him, and that he had a right to consult with an attorney. While warnings prior to a consensual search may not have the same indispensability as those required prior to a confession, *see* Agius v. United States, 5 Cir. 1969, 413 F.2d 915; Byrd v. Lane, 7 Cir. 1968, 398 F.2d 750; Gorman v. United States, 1 Cir. 1967, 380 F.2d 158; *cf.* Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, they do help

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[1]The question of the legality of appellant's arrest under Florida law is not free from doubt. See Benefield v. State, Fla.1964, 160 So.2d 706.

ensure that the consent is free, voluntary, and untainted by the arrest's possible illegality. In the instant case the presence of these warnings leads us to conclude that any coercion flowing from the possible illegality of appellant's arrest was dissipated. We therefore hold that the evidence supports the conclusion that appellant voluntarily consented to the search of his apartment.

[4] Nor do we think that, as appellant contends, the seizure of the driver's license went beyond the scope of that consent. While the request for appellant's consent was phrased in terms of a search for furs and jewels, that request cannot reasonably be construed as disabling the police from seizing evidence which there is reason to believe would aid in appellant's conviction for robbery. *See* Warden, Maryland Penitentiary v. Hayden, 1967, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. This was not a general exploratory search for articles without relation to the crime for which appellant was arrested. The unexplained presence in appellant's apartment of a driver's license bearing Annello's name would reasonably arouse suspicion that it was utilized in the robbery. Since there is a nexus between the crime for which the evidence was sought and the driver's license that was seized, we cannot hold that appellant's consent was abused.

[5] Moreover, the driver's license was in "plain view." As we have frequently noted, "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence. * * * Evidence concerning '[t]hat which is in plain view *is not the product of a search*' " Marshall

v. United States, 5 Cir. 1970, 422 F.2d 185, 188; *see* Harris v. United States, 1968, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067; United States v. Lee, 4 Cir. 1962, 308 F.2d 715. The police officers here were on the premises pursuant to appellant's consent, and the driver's license, being in plain view, was subject to seizure. For all these reasons we conclude that the state court did not err in admitting the driver's license into evidence.

[6] Appellant next argues that he was denied a fair trial because of the failure of the state trial court to grant his motion for severance. Appellant contends that he was prejudiced from the court's failure to sever because he was unable to examine his co-defendants who chose not to testify at their joint trial. Evidence seized from Antone and Ghelfi was introduced against all three co-defendants.[2] Thus, appellant claims, he should have been afforded an opportunity to question both co-defendants as to the validity of their consents to the searches which led to the seizure of the incriminating evidence.

We begin with the proposition that the denial of severance in a joint trial of co-defendants "is a matter within the sound discretion of the trial Judge, and his decision will not be overturned unless there is an affirmative showing of abuse of discretion." Milam v. United States, 5 Cir. 1963, 322 F.2d 104; *accord*, Blachly v. United States, 5 Cir. 1967, 380 F.2d 665, 674-675; Peterson v. United States, 5 Cir. 1965, 344 F.2d 419. No showing has been made that this discretion has here been abused.

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[2]The evidence which was seized from Antone and Ghelfi and introduced at the joint trial consisted of jewelry, furs, and guns.

[7] The record reveals that in fact appellant was able to examine his co-defendants with reference to their alleged consents. The state trial court held a hearing on appellant's motion to suppress. At that hearing all of the co-defendants testified, and appellant's counsel, who also represented the two co-defendants, questioned them fully as to their consent to the searches and the validity thereof. Appellant argues, however, that the jury was unable to hear this evidence. But this contention ignores the well-established rule that it is for the court, not the jury, to decide whether evidence has been illegally obtained. Phelper v. Decker, *supra*, 401 F.2d at 235; Burris v. United States, 5 Cir. 1951, 192 F.2d 253; C. Wright, Federal Practice & Procedure §675, at 124 (1969). Since all relevant testimony was adduced at the hearing on the motion to suppress, we agree with the district court's conclusion below that it is difficult "to see how, in fact, Petitioner was prejudiced."

[8] Alternatively, even if appellant had not been able to inquire into the validity of his co-defendants' consents, he could not be heard to complain, for he lacked standing to object to the introduction of the evidence seized from Antone and Ghelfi. Alderman v. United States, 1969, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176; Jones v. United States, 1960, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697; Sendejas v. United States, 9 Cir. 1970, 428 F.2d 1040, 1043-1044 (Tuttle, J.); Matthews v. United States, 5 Cir. 1969, 407 F.2d 1371, 1383. Since the searches in question were not directed at appellant or his premises, only his co-defendants could contest the validity of their consents. Since it would have been impermissible in this case for appellant to have been afforded the benefits of the exclusionary rule, he may

not now complain of any inability to examine Antone and Ghelfi with regard to their consents. We therefore conclude that the state trial court did not err in denying appellant's motion for severance.

The district court's denial of the petition for writ of habeas corpus is affirmed.

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Charles ABBOTT,
Defendant-Appellant.

No. 75-1821.

United States Court of Appeals,
Tenth Circuit.

Argued and Submitted Sept. 21, 1976.

Decided Jan. 6, 1977.

The United States District Court for the Eastern District of Oklahoma, Joseph W. Morris, Chief Judge, found defendant guilty of knowingly and unlawfully

possessing a .30 caliber carbine not registered to him, and he appealed. The Court of Appeals, Lewis, Chief Judge, held that defendant's wife was not shown to have consented to the warrantless search by the police of the trunk of her husband's automobile, in which the subject rifle was found, since she never expressly gave her consent to anyone to search the trunk, since, by initiating the act of searching the automobile, by requesting that it be done to prove proper registration so she could obtain possession of the automobile, and by actively participating in the search herself, she did not effectively consent to a search of the automobile including its locked trunk in her absence but, at most, implicitly consented to a search of the automobile in her presence and with her assistance, and since police officer's testimony that "she thought possibly this box containing several titles was in the trunk" and she indicated she wanted to get into the trunk was not clear and positive testimony of unequivocal and specific consent.

Judgment reversed with directions to sustain motion to suppress.

1. Searches and Seizures —7(28)

To establish justification for a warrantless search, there must be clear and positive testimony that consent was "unequivocal and specific" and "freely and intelligently" given; the Government must prove consent was given without duress or coercion, express or implied; and the courts will indulge every reasonable presumption against the waiver of fundamental constitutional rights

and there must be convincing evidence that such rights were waived.

2. Searches and Seizures —7(27)

Defendant's wife was not shown to have consented to the warrantless search by the police of the trunk of her husband's automobile, in which a rifle not registered to him was found, since she never expressly gave her consent to anyone to search the trunk, and since, by initiating the act of searching the automobile, by requesting that it be done to prove proper registration so she could obtain possession of the automobile, and by actively participating in the search herself, she did not effectively consent to a search of the automobile including its locked trunk in her absence but, at most, implicitly consented to a search of the automobile in her presence and with her assistance. 26 U.S.C.A. (I.R.C.1954) §5861(d).

3. Searches and Seizures —7(27)

If an individual's statements and actions are made and taken in the shadow of authoritative control, that is a factor to be considered when waiver of a fundamental right is considered.

Daniel J. Sears, Denver, Colo., for defendant-appellant.

Robert D. McDonald, Asst. U. S. Atty., Oklahoma City, Okl. (Richard A. Pyle, U. S. Atty., Muskogee, Okl., with him on the brief), for plaintiff-appellee.

Before LEWIS, Chief Judge, and BREITENSTEIN and SETH, Circuit Judges.

LEWIS, Chief Judge.

Appellant, James Abbott, was tried and convicted by a jury in the district court for the Eastern District of Oklahoma for knowingly and unlawfully possessing a .30 caliber carbine not registered to him in violation of 26 U.S.C. §5861(d). Appellant was sentenced to three years of imprisonment to be served concurrently with state court sentences then being served. During the trial appellant moved to suppress the carbine asserting that it had been obtained through an illegal search and seizure. The trial court denied the motion to suppress premised on a finding that appellant's wife had authoritatively[1] consented to the warrantless search of the trunk of appellant's automobile in which the carbine was found.

Appellant was stopped on March 26, 1974, by Officer Hardin of the Oklahoma Highway Patrol for a registration check of the automobile he was driving. The serial number and description on the registration produced by appellant did not correspond with the automobile he was driving. Hardin also discovered a .45 automatic under the seat of the automobile and arrested appellant for possession of the weapon and illegal registration of the automobile. Appellant was placed in custody in the county jail and his automobile was impounded in a private wrecker service garage.

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[1]Since we determine that the government failed to establish a consent search we need not discuss the appellate issue of Mrs. Abbott's *authority* to consent.

While appellant was in custody his wife appeared at the impound garage attempting to obtain release of the automobile. The title produced by Mrs. Abbott did not correspond with the automobile's identification number. With the assistance of Officer Hardin, Mrs. Abbott searched the passenger compartment for a small box which she believed contained the title to the automobile. When this search proved unsuccessful, Mrs. Abbott suggested that the box containing the title might possibly be in the trunk of the automobile. After Mrs. Abbott and Officer Hardin were unable to gain access to the trunk, Mrs. Abbott said she would go home, try to find the trunk key, and then return.

While she was gone, a deputy sheriff obtained the trunk key from the lining of appellant's coat pocket in his jail cell and delivered the key to Hardin at the impound garage. Although Mrs. Abbott had not returned to the garage, Hardin opened the trunk and found the small box containing several titles and a .30 caliber carbine which was the subject of this prosecution.

The government makes no claim that the subject warrantless search was justified by any exigency of time or circumstance nor excused within the bounds of *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, or *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. It relies entirely on the testimony of Officer Hardin to support the claim that Mrs. Abbott gave consent for the search. Hardin testified as follows:

> Q. What else did Mrs. Abbott do while you were there, Mr. Hardin?

A. She looked through the car trying to locate a small black or brown cardboard box with several titles in it. She said that another title to this car may be in this box and it would prove ownership and prove it was not stolen.

Q. Did you help her make that search of the car?

A. Yes, sir.

. . . . .

Q. Did Mrs. Abbott indicate that the title would be in the trunk?

A. She thought possibly this box containing several titles was in the trunk.

Q. Did you make any effort to get in the trunk yourself or indicate that she wanted to get into the trunk?

A. Yes, sir.

Q. Did you try to get in the trunk?

A. She was asking me about the key, there was only an ignition key in the car and she indicated if she had the key we would look in the trunk. We looked inside the car and under the floor mat possibly for another key, opened the glove box and thought there might be a

trunk release in the glove box for that particular car.

Q. Did she make any effort to obtain a key for the trunk herself?

A. She said she was going home and try to find the key and would be back.

Q. In the meantime did you obtain a key from Mr. Abbott's possessions at the jail?

A. Yes, sir.

Q. You opened the trunk with that key, is that correct?

A. Yes, sir.

[1] In *Villano v. United States*, 10 Cir., 310 F.2d 680, 684, this court set out the specifics necessary to sustain the burden required of the government to establish justification for a warrantless search. These rules may be paraphrased in the following manner: (1) There must be clear and positive testimony that consent was "unequivocal and specific" and "freely and intelligently" given; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

[2] Applying these rules to the instant case the government's case must fail. The evidence does not

indicate that Mrs. Abbott ever expressly gave her consent to anyone to search the trunk. By initiating the act of searching the automobile, by requesting that it be done to prove proper registration so she could obtain possession of the automobile, and by actively participating in the search herself the government contends Mrs. Abbott effectively consented to a search of the automobile including its locked trunk. We disagree. At the most, she implicitly consented to a search of the automobile in her presence and with her assistance. Her implicit consent to search the passenger compartment in her presence with her assistance does not constitute unequivocal and specific consent to search the locked trunk in her absence. Officer Hardin's testimony that "[s]he thought possibly this box containing several titles was in the trunk" and that she indicated she wanted to get into the trunk is not clear and positive testimony of an unequivocal and specific consent.

[3] Each of Mrs. Abbott's statements and actions was made and taken in the shadow of authoritative control, a factor always to be considered when waiver of a fundamental right is to be considered. Here her husband was incarcerated, she had need for the automobile, and she was surrounded by police officers. Since the car was impounded it is unlikely she believed she could search the car in privacy. Such an atmosphere increases the burden of showing a free and uninhibited waiver and consent.

The judgment of conviction is reversed with directions to sustain the motion to suppress and for such further proceedings as are consistent with the decision of this court.

[440 US 648]

STATE OF DELAWARE,

Petitioner,

v

WILLIAM J. PROUSE, III

440 US 648, 59 L Ed 2d 660, 99 S Ct 1391

[No. 77-1571]

Argued January 17, 1979. Decided March 27, 1979.

Decision: Police officer's random stop of auto and detention of driver for check of driver's license and vehicle's registration, held violative of Fourth Amendment as unreasonable seizure.

SUMMARY

A New Castle County, Delaware, police officer stopped an automobile and seized marijuana in plain view on the car floor after smelling marijuana smoke

SUBJECT OF ANNOTATION

Beginning on page 924, infra

What constitutes adequate and independent state substantive ground precluding Supreme Court review of state court decision on federal question

Briefs of Counsel, p 921, infra.

as he walked toward the stopped vehicle. An occupant of the vehicle who had been indicted for illegal possession of a controlled substance moved to suppress, at his state trial, the marijuana seized as a result of the stop. At a hearing on the motion to suppress, the police officer testified that prior to stopping the vehicle he had observed neither traffic or equipment violations, nor any suspicious activity, and that he had made the stop only in order to check the driver's license and the registration of the vehicle. Finding the police officer's stop and detention to have been violative of the Fourth Amendment, the trial court granted the motion to suppress. The Delaware Supreme Court affirmed, holding that a random stop of a motorist in the absence of specific articulable facts justifying the stop by indicating a reasonable suspicion that a violation of law has occurred was constitutionally impermissible and violative of the Fourth and Fourteenth Amendments (382 A2d 1359).

On certiorari, the United States Supreme Court affirmed. In an opinion by WHITE, J., joined by BURGER, Ch. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., it was held that, (1) as a preliminary matter, the court had jurisdiction in the case at bar even though the Delaware Supreme Court had held that the stop at issue not only violated the Federal Constitution but also a provision of the state constitution substantially similar to the Fourth Amendment, since the Delaware Supreme Court had not rested its decision independently on the state constitution but had based its decision on the Fourth and Fourteenth Amendments, having followed the approach, consistent with previous opinions of the Delaware Supreme Court, of interpreting the state

constitutional provision in terms of the breadth and scope of the Fourth and Fourteenth Amendments, and (2) a policeman's stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth and Fourteenth Amendments, except in those situations in which there is at least an articulable and reasonable suspicion that a motorist is unlicensed, or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, such rule against random stops and detentions, however, not precluding a state from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion, such as, for example, the questioning of all oncoming traffic at roadblock-type stops.

BLACKMUN, J., joined by POWELL, J., concurred, with the understanding that (1) the court's allowing spot checks that do not involve the unconstrained exercise of discretion would include, in addition to a roadblock stop for all traffic, other stops that were not purely random and that equate with, but are less intrusive than, a 100% roadblock stop, and (2) the court's decision was distinguishable, for purposes of constitutionality, from individualized random examinations by game wardens in the performance of their duties.

REHNQUIST, Jr., dissenting, expressed the view that the state's system of random spot checks of vehicles was not violative of the Fourth Amendment, and that there was no basis for distinguishing, for Fourth Amendment purposes, between a roadblock stop of all

cars and the random stop of a car in order to check the driver's license and the vehicle's registration.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure §8 — random auto stop and detention — license and registration check

1a, 1b, 1c. A police officer's stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth and Fourteenth Amendments, where the police officer has no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, there being no justification for subjecting every occupant of every vehicle on the roads to a seizure at the unbridled discretion of law-enforcement officials on the basis of a state interest in promoting roadway safety. (Rehnquist, J., dissented from this holding.)

Appeal and Error §500 — Supreme Court jurisdiction — review of state court decision — independent and adequate state ground — police stop of vehicle

2. The United States Supreme Court has jurisdiction to review, on certiorari, the decision of a state's highest court holding that a policeman's random stop of a vehicle violated Fourth and Fourteenth

Amendments to the United States Constitution and a provision of the state constitution substantially similar to the Fourth Amendment, and the Supreme Court's

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68 Am Jur 2d, Searches and Seizures §16
7 Federal Procedural Forms L Ed, Criminal Procedure §§20:571 et seq.
8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure Forms 171 et seq.
5 Am Jur Trials 331, Excluding Illegally Obtained Evidence
USCS, Constitution, 4th Amendment
US L Ed Digest, Search and Seizure §8
L Ed Index to Annos, Motor Vehicles and Carriers
ALR Quick Index, Automobiles and Highway Traffic
Federal Quick Index, Automobiles and Highway Traffic

ANNOTATION REFERENCES

What constitutes adequate and independent state substantive ground precluding Supreme Court review of state court decision on federal question. 59 L Ed 2d 924.

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

What indication that state court's decision turned on federal question will move the Supreme Court to review it. 84 L Ed 925, 100 L Ed 1200.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

jurisdiction is not barred on the ground of the state court's judgment having been based on an independent and adequate state ground, where even if the state constitution would have provided an adequate basis for the judgment, the holding of the state's highest court depended upon its view of the reach of the Fourth and Fourteenth Amendments, the state court having followed the approach, consistent with its previous decisions, that the state constitution would automatically be interpreted at least as broadly as the Fourth Amendment so that every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendments would, without further analysis, be held contrary to the state constitutional provision.

[See annotation p 924, infa]

Appeal and Error §487 — independent and adequate state ground — Supreme Court jurisdiction

3. If the decision of a state's highest court is based solely on the United States Constitution, without mention of state law, the United States Supreme Court will have jurisdiction to review the decision on certiorari, even though the state constitution might have provided an independent and adequate state ground upon which the state court could have based its decision.

Search and Seizure §2 — stopping automobile

4. A state police officer's stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments,

even though the purpose of the stop is limited and the resulting detention quite brief.

Search and Seizure §5 — Fourth Amendment — reasonableness

5. Since the essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law-enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions, the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Search and Seizure §6 — Fourth Amendment — persons protected — persons in autos

6. An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation, and just as people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks, nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Search and Seizure §8 — auto stops — registration and license checks — roadblock-type stops

7. The rule that a police officer's stopping an automobile and detaining the driver in order to check

his driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth Amendment when there is no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, does not preclude the state from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion, the questioning of all oncoming traffic at roadblock-type stops being one possible alternative.

Search and Seizure §8 — auto stops — license and registration checks — weigh-stations and inspection points for trucks

8a, 8b. The rule that a police officer's stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth Amendment when there is no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, does not cast doubt on the permissibility of roadside truck weigh-stations and inspection points at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.

SYLLABUS BY REPORTER OF DECISIONS

A patrolman in a police cruiser stopped an automobile occupied by respondent and seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment. The Delaware Supreme Court affirmed. *Held:*

1. This Court has jurisdiction in this case even though the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but was also impermissible under the Delaware Constitution. That court's opinion shows that even if the state Constitution would have provided an adequate basis for the judgment below, the court did not intend to rest its decision independently on the state Constitution, its holding instead depending upon its view of the reach of the Fourth and Fourteenth Amendments.

2. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the

vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

(a) Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

(b) The State's interest in discretionary spot checks as a means of ensuring the safety of its roadways does not outweigh the resulting intrusion on the privacy and security of the persons detained. Given the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents, cf. United States v Brignoni-Ponce, 422 US 873, 45 L Ed 2d 607, 95 S Ct 2574, United States v Martinez-Fuerte, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074, the marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure at the unbridled discretion of law enforcement officials.

(c) An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. People are not shorn of all Forth Amendment protection when they step

from their homes onto the public sidewalk; nor are they shorn of those interests when they step from the sidewalks into their automobiles.

(d) The holding in this case does not preclude Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. 382 A 2d 1359, affirmed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens, JJ., joined. Blackmun, J., filed a concurring opinion, in which Powell, J., joined. Rehnquist, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Charles M. Oberly, III, argued the cause for petitioner.

David M. Lukoff argued the case for respondent.

Briefs of Counsel, p 921, infra.

OPINION OF THE COURT

[440 US 650]

Mr. Justice White delivered the opinion of the Court.

[1a] The question is whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments

to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.

I

At 7:20 p.m. on November 30, 1976, a New Castle County, Del., patrolman in a police cruiser stopped the automobile occupied by respondent.[1] The patrolman smelled marihuana smoke as he was walking toward the stopped vehicle, and he seized marihuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marihuana seized as a result of the stop, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration. The patrolman was not acting pursuant to any standards, guidelines,

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[1]In its opinion, the Delaware Supreme Court referred to respondent as the operator of the vehicle, see 382 A2d 1359, 1361 (1978). However, the arresting officer testified: "I don't believe [respondent] was the driver.... As I recall, he was in the back seat...," App A12; and the trial court in its ruling on the motion to suppress referred to respondent as one of the four "occupants" of the vehicle, id., at A17. The vehicle was registered to respondent. Id., at A10.

or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. Characterizing the stop as "routine," the patrolman explained, "I saw the car [440 US 651] in the area and wasn't answering any complaints, so I decided to pull them off." App A9. The trial court granted the motion to suppress, finding the stop and detention to have been wholly capricious and therefore violative of the Fourth Amendment.

The Delaware Supreme Court affirmed, noting first that "[t]he issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court," 382 A2d 1359, 1362 (1978) (emphasis in original). The court held that "a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution." Id., at 1364. We granted certiorari to resolve the conflict between this decision, which is in accord with decisions in five other jurisdictions,[2] and the contrary determination in six

[2]United States v Montgomery, 182 US App DC 426, 561 F2d 875 (1977); People v Ingle, 36 NY2d 413, 330 NE2d 39 (1975); State v Ochoa, 23 Ariz App 510, 534 P2d 441 (1975), revd on other grounds, 112 Ariz 582, 544 P2d 1097 (1976); Commonwealth v Swanger, 453 Pa 107, 307 A2d 875 (1973); United States v Nicholas, 448 F2d 622 (CA8 1971). See also United States v Cupps, 503 F2d 277 (CA6 1974).

jurisdictions[3] that the Fourth Amendment does not prohibit the kind of automobile stop that occurred here. 439 US 816, 58 L Ed 2d 107, 99 S Ct 76 (1978).

II

[2] Because the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but was [440 US 652] also impermissible under Art I, §6, of the Delaware Constitution, it is urged that the judgment below was based on an independent and adequate state ground and that we therefore have no jurisdiction in this case. Fox Film Corp. v Muller, 296 US 207, 210, 80 L Ed 158, 56 S Ct 183 (1935). At least, it is suggested, the matter is sufficiently uncertain that we should remand for clarification as to the ground upon which the judgment rested. California v Krivda, 409 US 33, 35, 34 L Ed 2d 45, 93 S Ct 32 (1972). Based on our reading of the opinion, however, we are satisfied that even if the state Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the state Constitution and that we have jurisdiction of this case.

[3] As we understand the opinion below, Art I, §6, of the Delaware Constitution will automatically be

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[3]State v Holmberg, 194 Neb 337, 231 NW2d 672 (1975); State v Allen, 282 NC 503, 194 SE2d 9 (1973); Palmore v United States, 289 A2d 573 (DC App 1972), affd on jurisdictional grounds only, 411 US 389, 36 L Ed 2d 342, 93 S Ct 1670 (1973); Leonard v State, 496 SW2d 576 (Tex Crim App 1973); United States v Jenkins, 528 F2d 713 (CA10 1975); Myricks v United States, 370 F2d 901 (CA5), cert dismissed, 386 US 1015, 18 L Ed 2d 474, 87 S Ct 1366 (1967).

interpreted at least as broadly as the Fourth Amendment;[4] that is, every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendments will, without further analysis, be held to be contrary to Art I, §6. This approach, which is consistent with previous opinions of the Delaware Supreme Court,[5] was followed in this case. The court analyzed [440 US 653] the various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment foreclosed spot checks of automobiles, and summarily held that the state

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[4]The court stated: "The Delaware Constitution Article I, §6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former." 382 A2d, at 1362, citing State v. Moore, 55 Del 356, 187 A2d 807 (1963).

Moore was decided less than two years after Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 16 Ohio Ops 2d 384, 86 Ohio L Abs 513, 84 ALR2d 933 (1961), applied to the States the limitations previously imposed only on the Federal Government. In setting forth the approach reiterated in the opinion below, Moore noted not only the common purposes and wording of the Fourth Amendment and the state constitutional provision, but also the overriding effect of the former. See 55 Del, at 362-363, 187 A2d, at 810-811.

[5]We have found only one case decided after State v Moore, supra, in which the court relied solely on state law in upholding the validity of a search or seizure, and that case involved not only Del Const Art I, §6, but also state statutory requirements for issuance of a search warrant. Rossitto v State, 234, A2d 438 (1967). Moreover, every case holding a search or seizure to be contrary to the state constitutional provision relies on cases interpreting the Fourth Amendment and simultaneously concludes that the search or seizure is contrary to that provision. See, e.g., Young v State, 339 A2d 723 (1975); Freeman v State, 317 A2d 540 (1974); cf. Bertomeu v State, 310 A2d 865 (1973).

Constitution was therefore also infringed. This is one of those cases where "at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." Zacchini v Scripps-Howard Broadcasting Co., 433 US 562, 568, 53 L Ed 2d 965, 97 S Ct 2849, 5 Ohio Ops 3d 215 (1977). Had state law not been mentioned at all, there would be no question about our jurisdiction, even though the state Constitution might have provided an independent and adequate state ground. Ibid. The same result should follow here where the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments. If the state court misapprehended federal law, "[i]t should be freed to decide . . . these suits according to its own local law." Missouri ex rel. Southern R. Co. v Mayfield, 340 US 1, 5, 95 L Ed 3, 71 S Ct 1 (1950).

III

[4, 5] The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. United States v Martinez-Fuerte, 428 US 543, 556-558, 49 L Ed 2d 1116, 96 S Ct 3074 (1976); United States v Brignoni-Ponce, 422 US 873, 878, 45 L Ed 2d 607, 95 S Ct 2574 (1975); cf. Terry v Ohio, 392 US 1, 16, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968). The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard [440 US

654] of "reasonableness"[6] upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasions. . . .' " Marshall v Barlow's, Inc., 436 US 307, 312, 56 L Ed 2d 305, 98 S Ct 1816 (1978), quoting Camara v Municipal Court, 387 US 523, 528, 18 L Ed 2d 930, 87 S Ct 1727 (1967).[7] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.[8] Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective

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[6]See Marshall v Barlow's, Inc., 436 US 307, 315, 56 L Ed 2d 305, 98 S Ct 1816 (1978); United States v Brignoni-Ponce, 422 US 873, 878, 45 L Ed 2d 607, 95 S Ct 2574 (1975); Cady v Dombrowski, 413 US 433, 439, 37 L Ed 2d 706, 93 S Ct 2523 (1973); Terry v Ohio, 392 US 1, 20-21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 (1968); Camara v Municipal Court, 387 US 523, 539, 18 L Ed 2d 930, 87 S Ct 1727 (1967).

[7]See also United States v Martinez-Fuerte, 428 US 543, 554, 49 L Ed 2d 1116, 96 S Ct 3074 (1976); United States v Ortiz, 422 US 891, 895, 45 L Ed 2d 623, 95 S Ct 2585 (1975); Almeida-Sanchez v United States, 413 US 266, 270, 37 L Ed 2d 596, 93 S Ct 2535 (1973); Beck v Ohio, 379 US 89, 97, 13 L Ed 2d 142, 85 S Ct 223, 3 Ohio Misc 71, 31 Ohio Ops 2d 80 (1964); McDonald v United States, 335 US 451, 455-456, 93 L Ed 153, 69 S Ct 191 (1948).

[8]See, e.g., United States v Ramsey, 431 US 606, 616-619, 52 L Ed 2d 617, 97 S Ct 1972 (1977); United States v Martinez-Fuerte, supra, at 555, 49 L Ed 2d 1116, 96 S Ct 3074; cases cited in n 6, supra.

standard,"[9] whether this be probable cause[10] or a less stringent test.[11] In those situations in which the balance of interests precludes insistence upon "some quantum [440 US 655] of individualized suspicion."[12] other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." Camara v Municipal Court, 387 US, at 532, 18 L Ed 2d 930, 87 S Ct 1727. See id., at 534-535, 18 L Ed 2d 930, 97 S Ct 1727; Marshall v Barlow's, Inc., supra, at 320-321, 56 L Ed 2d 305, 98 S

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[9]Terry v Ohio, supra, at 21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383. See also Scott v United States, 436 US 128, 137, 56 L Ed 2d 168, 98 S Ct 1717 (1978); Beck v Ohio, supra, at 96-97, 13 L Ed 2d 142, 85 S Ct 223, 3 Ohio Misc 71, 31 Ohio Ops 2d 80.

[10]See, e.g., United States v. Santana, 427 US 38, 49 L Ed 2d 300, 96 S Ct 2406 (1976); United States v Watson, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976); Ker v California, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623, 24 Ohio Ops 2d 201 (1963) (warrantless arrests requiring probable cause); United States v Ortiz, supra; Warden v Hayden, 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642 (1967); Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925) (warrantless searches requiring probable cause). See also Gerstein v Pugh, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (1975).

[11]See Terry v Ohio, supra; United States v Brignoni-Ponce, supra.

In addition, the Warrant Clause of the Fourth Amendment generally requires that prior to a search a neutral and detached magistrate ascertain that the requisite standard is met, see, e. g., Mincey v Arizona, 437 US 385, 57 L Ed 2d 290, 98 S Ct 2408 (1978).

[12]United States v Martinez-Fuerte, supra, at 560, 49 L Ed 2d 1116, 96 S Ct 3074.

Ct 1816; United States v United States District Court, 407 US 297, 322-323, 32 L Ed 2d 752, 92 S Ct 2125 (1972) (requiring warrants).

In this case, however, the State of Delaware urges that patrol officers be subject to no constraints in deciding which automobiles shall be stopped for a license and registration check because the State's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained.

IV

We have only recently considered the legality of investigative stops of automobiles where the officers making the stop have neither probable cause to believe nor reasonable suspicion that either the automobile or its occupants are subject to seizure under the applicable criminal laws. In United States v Brignoni-Ponce, supra, Border Patrol agents conducting roving patrols in areas near the international border asserted statutory authority to stop at random any vehicle in order to determine whether it contained illegal aliens or was involved in smuggling operations. The practice was held to violate the Fourth Amendment, but the Court did not invalidate all warrantless automobile stops upon less than probable cause. Given "the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border," 422 US, at 881, 45 L Ed 2d 607, 95 S Ct 2574, the Court analogized the roving-patrol stop to the on-the-street encounter addressed in Terry v Ohio, supra, and held:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are [440 US 656] aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 422 US, at 884, 45 L Ed 2d 607, 95 S Ct 2574 (footnote omitted).

Because "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators," id., at 883, 45 L Ed 2d 607, 95 S Ct 2574, "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." Ibid.

The constitutionality of stops by Border Patrol agents was again before the Court in United States v Martinez-Fuerte, supra, in which we addressed the permissibility of checkpoint operations. This practice involved slowing all oncoming traffic "to a virtual, if not a complete, halt," 428 US, at 546, 49 L Ed 2d 1116, 96 S Ct 3074, at a highway roadblock, and referring vehicles chosen at the discretion of Border Patrol agents to an area for secondary inspection. See id., at 546, 558, 49 L Ed 2d 1116, 96 S Ct 3074. Recognizing that the governmental interest involved was the same as that furthered by roving-patrol stops, the Court nonetheless sustained the constitutionality of the Border Patrol's checkpoint operations. The crucial distinction was the

lesser intrusion upon the motorist's Fourth Amendment interests:

> "[The] objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." Id., at 558, 49 L Ed 2d 1116, 96 S Ct 3074.

Although not dispositive,[13] these decisions undoubtedly provide [440 US 657] guidance in balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case. We cannot agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway and that it bears greater resemblance to a permissible stop and secondary detention at a checkpoint near the border. In this regard, we note that Brignoni-Ponce was not limited to roving-patrol stops on limited access roads, but applied to any roving-patrol stop by Border Patrol agents on any type of

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[13]In addressing the constitutionality of Border Patrol practices, we reserved the question of the permissibility of state and local officials stopping motorists for document questioning in a manner similar to checkpoint detention, see 428 US, at 560 n 14, 49 L Ed 2d 1116, 96 S Ct 3074, or roving-patrol operations, see United States v Brignoni-Ponce, 422 US, at 883 n 8, 45 L Ed 2d 607, 95 S Ct 2574.

roadway on less than reasonable suspicion. See 422 US, at 882-883, 45 L Ed 2d 607, 95 S Ct 2574; United States v Ortiz, 422 US 891, 894, 45 L Ed 2d 623, 95 S Ct 2585 (1975). We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." Id., at 894-895, 45 L Ed 2d 623, 95 S Ct 2585, quoted in United States v Martinez-Fuerte, 428 US, at 558, 49 L Ed 2d 1116, 96 S Ct 3074.

[440 US 658]

[V]

But the State of Delaware urges that even if discretionary spot checks such as occurred in this case intrude upon motorists as much as or more than do the

roving patrols held impermissible in Brignoni-Ponce, these stops are reasonable under the Fourth Amendment because the State's interest in the practice as a means of promoting public safety upon its roads more than outweighs the intrusion entailed. Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life[14] and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle.[15] The registration requirement and, more pointedly, the related annual inspection requirement in Delaware[16] are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly

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[14]In 1977, 47,671 persons died in motor vehicle accidents in this country. U.S. Dept. of Transportation, Highway Safety A-9 (1977).

[15]See, e.g., Del Code Ann, Tit 21, §§2701, 2707 (1974 and Supp 1977), §2713 (1974) (Department of Public Safety "shall examine the applicant as to his physical and mental qualifications to operate a motor vehicle in such manner as not to jeopardize the safety of persons or property . . .").

[16]§2143(a) (1974).

administered, are essential elements in a highway safety program. Furthermore, we note that the State of Delaware requires a minimum amount of insurance [440 US 659] coverage as a condition to automobile registration,[17] implementing its legitimate interest in seeing to it that its citizens have protection when involved in a motor vehicle accident.[18]

The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental countribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.

The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions,

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[17]§2118 (Supp 1977): State of Delaware, Department of Public Safety, Division of Motor Vehicles, Driver's Manual 60 (1976).

[18]It has been urged that additional state interests are the apprehension of stolen motor vehicles and of drivers under the influence of alcohol or narcotics. The latter interest is subsumed by the interest in roadway safety, as may be the former interest to some extent. The remaining governmental interest in controlling automobile thefts is not distinguishable from the general interest in crime control.

licenses and registration papers are subject to inspection and drivers without them will be ascertained. Furthermore, drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves.[19] Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers. If this were not so, licensing of drivers would hardly be an effective means of promoting roadway safety. It seems common sense that the [440 US 660] percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed. The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best. Furthermore, and again absent something more than mere assertion to the contrary, we find it difficult to believe that the unlicensed driver would not be deterred by the possibility of being involved in a traffic violation or having some other experience calling for proof of his entitlement to drive but that he would be deterred by the possibility that he would be one of those chosen for a spot check. In terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment.

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[19]Cf. United States v Brignoni-Ponce, supra, at 883, 45 L Ed 2d 607, 95 S Ct 2574.

Much the same can be said about the safety aspects of automobiles as distinguished from drivers. Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately. Furthermore, in Delaware, as elsewhere, vehicles must carry and display current license plates,[20] which themselves evidence that the vehicle is properly registered,[21] and, under Delaware law, to qualify for annual registration a vehicle must pass the annual safety inspection[22] and be properly insured.[23] It does not appear, therefore, that a stop of a Delaware-registered vehicle is necessary in order to ascertain compliance with the State's registration requirements; and because there is nothing to [440 US 661] show that a significant percentage of automobiles from other States do not also require license plates indicating current registration, there is no basis for concluding that stopping even out-of-state cars for document checks substantially promotes the State's interest.

[1b] The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on

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[19]Cf. United States v Brignoni-Ponce, supra, at 883, 45 L Ed 2d 607, 95 S Ct 2574.

[20]Del Code Ann, Tit 21, §2126 (1974).

[21]§§2121(b), (d) (1974).

[22]See n 16, supra; §2109 (1974).

[23]See n 17, supra; §2109 (1974).

the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." Terry v Ohio, 392 US, at 22, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations[24] —or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. Almeida-Sanchez v United States, 413 US 266, 270, 37 L Ed 2d 596, 93 S Ct 2535 (1973); Camara v Municipal Court, 387 US, at 532-533, 18 L Ed 2d 930, 87 S Ct 1727.

[440 US 662]

[24]See, e. g., §§4101-4199B (1974 and Supp 1977).

VI

The "grave danger" of abuse of discretion, United States v Martinez-Fuerte, 428 US, at 559, 49 L Ed 2d 1116, 96 S Ct 3074, does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police-citizen contact. Cady v Dombrowski, 413 US 433, 441, 37 L Ed 2d 706, 93 S Ct 2523 (1973). Only last Term we pointed out that "if the government intrudes . . . the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." Marshall v Barlow's, Inc., 436 US, at 312-313, 56 L Ed 2d 305, 98 S Ct 1816. There are certain "relatively unique circumstances," id., at 313, 56 L Ed 2d 305, 98 S Ct 1816, in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. See United States v Biswell, 406 US 311, 32 L Ed 2d 87, 92 S Ct 1593 (1972) (federal regulation of firearms); Colonnade Catering Corp. v United States, 397 US 72, 25 L Ed 2d 60, 90 S Ct 774 (1970) (federal regulation of liquor). Otherwise, regulatory inspections unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified "neutral criteria." Marshall v Barlow's, Inc., supra, at 323, 56 L Ed 2d 305, 98 S Ct 1816.

[6] An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject

to government regulation.[25] Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the [440 US 663] individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As Terry v Ohio, supra, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. See Adams v Williams, 407 US 143, 146, 32 L Ed 2d 612, 92 S Ct 1921 (1972).

VII

[1c, 7, 8a] Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure

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[25]Cf. Marshall v Barlow's, Inc. 436 US 307, 56 L Ed 2d 305, 98 S Ct 1816 (1978) (warrant required for federal inspection under interstate commerce power of health and safety of workplace); See v Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967) (warrant required for inspection of warehouse for municipal fire code violations); Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967) (warrant required for inspection of residence for municipal fire code violations).

for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.[26] Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. The judgment below is affirmed.

So ordered.

SEPARATE OPINIONS

Mr. Justice Blackmun, with whom Mr. Justice Powell joins, concurring.

The Court, ante, at this page, 59 L Ed 2d, at 673, carefully protects from the reach of its decision other less intrusive spot checks "that do not involve [440 US 664] the unconstrained exercise of discretion." The roadblock stop for all traffic is given as an example. I necessarily assume that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point) that equate with, but are

[26][8b] Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.

less intrusive than, a 100% roadblock stop. And I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties. In a situation of that type, it seems to me, the Court's balancing process, and the value factors under consideration, would be quite different.

With this understanding, I join the Court's opinion and its judgment.

Mr. Justice Rehnquist, dissenting.

The Court holds, in successive sentences, that absent an articulable, reasonable suspicion of unlawful conduct, a motorist may not be subjected to a random license check, but that the States are free to develop "methods for spot checks that . . . do not involve the unconstrained exercise of discretion," such as "[q]uestioning . . . all oncoming traffic at roadblock-type stops . . . ." Ante, at 663, 59 L Ed 2d, at 673-674. Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop *less* than all motorists. The Court thus elevates the adage "misery loves company" to a novel role in Fourth Amendment jurisprudence. The rule becomes "curiouser and curiouser" as one attempts to follow the Court's explanation for it.

As the Court correctly points out, people are not shorn of their Fourth Amendment protection when

they step from their homes onto the public sidewalks or from the sidwalks into [440 US 665] their automobiles. But a random license check on a motorist operating a vehicle on highways owned and maintained by the State is quite different from a random stop designed to uncover violations of laws that have nothing to do with motor vehicles.* No one questions that the State may require the licensing of those who drive on its highways and the registration of vehicles which are driven on those highways. If it may insist on these requirements, it obviously may take steps necessary to enforce compliance. The reasonableness of the enforcement measure chosen by the State is tested by weighing its intrusion on the motorists' Fourth Amendment interests against its promotion of the State's legitimate interests. E. g., United States v Brignoni-Ponce, 422 US 873, 878, 45 L Ed 2d 607, 95 S Ct 2574 (1975).

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*Indeed, this distinction was expressly recognized in United States v Brignoni-Ponce, 422 US 873, 883 n 8, 45 L Ed 2d 607, 95 S Ct 2574 (1975):

"Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters."

In executing this balancing process, the Court concludes that given the alternative mechanisms available, discretionary spot checks are not a "sufficiently productive mechanism" to safeguard the State's admittedly "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Ante, at 659, 658, 59 L Ed 2d, at 671, 670. Foremost among the alternative methods of enforcing traffic and vehicle [440 US 666] safety regulations, according to the Court, is acting upon observed violations, for "drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves." Ante, at 659, 59 L Ed 2d, at 671. Noting that "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers," ibid., the Court concludes that the contribution to highway safety made by random stops would be marginal at best. The State's primary interest, however, is in traffic safety, not in apprehending unlicensed motorists for the sake of apprehending unlicensed motorists. The whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.

Nor is the Court impressed with the deterrence rationale, finding it inconceivable that an unlicensed driver who is not deterred by the prospect of being

involved in a traffic violation or other incident requiring him to produce a license would be deterred by the possibility of being subjected to a spot check. The Court arrives at its conclusion without the benefit of a shred of empirical data in this record suggesting that a system of random spot checks would fail to deter violators. In the absence of such evidence, the State's determination that random stops would serve a deterrence function should stand.

On the other side of the balance, the Court advances only the most diaphanous of citizen interests. Indeed, the Court does not say that these interests can never be infringed by the State, just that the State must infringe them en masse rather than citizen by citizen. To comply with the Fourth Amendment, the State need only subject *all* citizens to the same "anxiety" and "inconvenien[ce]" to which it now subjects only a few.

[440 US 667]

For constitutional purposes, the action of an individual law enforcement officer is the action of the State itself, e. g., Ex parte Virginia, 100 US 339, 346-347, 25 L Ed 676 (1880), and state acts are accompanied by a presumption of validity until shown otherwise. See, e.g., McDonald v Board of Election, 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404 (1969). Although a system of discretionary stops could conceivably be abused, the record before us contains no showing that such abuse is probable or even likely. Nor is there evidence in the record that a system of random license checks would fail adequately to further the State's interest in deterring and apprehending violators. Nevertheless, the Court

concludes "[o]n the record before us" that the random spot check is not "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." Ante, at 659, 59 L Ed 2d, at 671. I think that the Court's approach reverses the presumption of constitutionality accorded acts of the States. The burden is not upon the State to demonstrate that its procedures are consistent with the Fourth Amendment, but upon respondent to demonstrate that they are not. "On this record" respondent has failed to make such a demonstration.

Neither the Court's opinion, nor the opinion of the Supreme Court of Delaware, suggests that the random stop made in this case was carried out in a manner inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Absent an equal protection violation, the fact that random stops may entail "a possibly unsettling show of authority," ante, at 657, 59 L Ed 2d, at 670, and "may create substantial anxiety," ibid., seems an insufficient basis to distinguish for Fourth Amendment purposes between a roadblock stopping all cars and the random stop at issue here. Accordingly, I would reverse the judgment of the Supreme Court of Delaware.

EDITOR'S NOTE

An annotation on "What constitutes adequate and independent state substantive ground precluding Supreme Court review of state court decision on federal question," appears p 924, infra.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nathaniel TROUTMAN,
Defendant-Appellant,

No. 78-5597
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1979

Defendant was convicted before the United States District Court for the Northern District of Georgia, Richard C. Freeman, J., of possession of heroin with intent to distribute, and he appealed. The Court of Appeals held that although initial stop of defendant may have been illegal, record supported finding that his consent to search of his luggage and person was freely and voluntarily given, in that he had been twice advised of his rights, including right to refuse consent, and that the search was not the product of coercive conduct.

Affirmed.

1. Criminal Law —1144.13(3), 1158(1)

Credibility judgments are made by the district court; on appeal, the Court of Appeals must view the

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

evidence in the light most favorable to the Government and must accept the lower court's findings if supported by substantial evidence.

2. Criminal Law —736(1)

Question of voluntariness of consent to a search is a question of fact to be determined from the totality of the circumstances.

3. Criminal Law —1158(2)

Trial court's holding as to voluntariness of consent to search will not be overturned on appeal unless clearly erroneous.

4. Searches and Seizures —7(28)

Although initial stop of defendant may have been illegal, record supported finding that defendant's subsequent consent to search of his luggage and person was freely and voluntarily given, in that he had been twice advised of his rights, including right to refuse consent, and that he was not coerced into consenting.

Richard R. Kirby, Decatur, Ga., for defendant-appellant.

William L. Harper, U.S. Atty., Robert A. Boas, Asst. U.S. Atty., Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

Defendant Nathaniel Troutman was convicted in the United States District Court for the Northern District of Georgia for possession with intent to distribute ninety-two grams of heroin hydrochloride in violation of 21 U.S.C. §841(a)(1). He appeals to this court complaining of the legality of the search during which the heroin was discovered.

The record shows that on February 23, 1978, Paul J. Markonni, a Special Agent for the Drug Enforcement Administration, and two other officers were on duty at the Atlanta airport. At about 3:30 p.m. on that date the three officers were observing the arrival of a non-stop flight from Los Angeles, California. The defendant deplaned from that flight. Various characteristics of the defendant made the officers suspicious of him. They accosted Troutman at a taxi stand outside the terminal and asked for his identification. The court below found that there was insufficient cause to justify a stop and ruled that the stop was illegal. The government does not now challenge that ruling. We accept as correct the conclusion that Troutman was illegally stopped.

After he identified himself, Troutman was asked by Agent Markonni if he would object to a search of his person and tote bag. From this point the evidence is in sharp conflict. According to Agent Markonni's testimony Troutman said that he did not mind and started to open the bag out on the sidewalk. Markonni suggested that

they step inside the terminal where they might have more privacy. Troutman stopped opening his bag and started walking back toward the terminal. They walked into the office of the Atlanta Police Bureau inside the terminal. Markonni again advised him that he was a narcotic agent, asked Troutman's permission to check both his person and his bags for narcotics, and pulled out a card from which he read Troutman his right to allow or refuse to allow a search. Troutman acknowledged that he understood his rights. Markonni said that Troutman then asked how long it would take for him to get a search warrant. Markonni replied that it would probably take a couple or three hours but that "I don't even know whether the judge would give me one," at which time Troutman said, "All right, go ahead and look." Because Markonni considered this an ambiguous answer he again stated, "All right, I have your permission to look in your bag and also to search you?" Troutman said, "Yes."

No contraband was discovered inside the tote bag. When he conducted a pat down search of Troutman he discovered something concealed in the area of his crotch. He asked Troutman to drop his trousers and found ninety-two grams of 6.5% heroin.

Troutman contends that he never gave any consent to the search, that it was conducted without his permission, that he instructed the officers to get a search warrant but that they went ahead and searched him without his permission and without a warrant.

[1] Credibility judgments, of course, are made by the district court. On appeal we must we must view the

evidence in the light most favorable to the government, and must accept the lower court's findings if they are supported by substantial evidence. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

Substantial evidence clearly supported the district court's findings that Markonni's version was correct. The precise question which is presented to this court, therefore, is whether a search conducted with consent, as testified to by Agent Markonni, removed the taint of the initial stop of Troutman that was clearly illegal.

Bretti v. Wainwright, 439 F.2d 1042 (5th Cir.), *cert. denied*, 404 U.S. 943, 92 S.Ct. 293, 30 L.Ed.2d 257 (1971) presented a fact situation that was quite similar to that now before the court. Bretti was arrested after which his home was searched. Bretti contended that his arrest was illegal and that any consent to search that he might have given was vitiated because it was predicated upon an illegal arrest. This court concluded that even if the arrest was illegal the subsequent consent was untainted under the reasoning of *Phelper v. Decker*, 401 F.2d 232 (5th Cir. 1968). The evidence supported the conclusion that Bretti was warned of his rights prior to his giving consent. Speaking through Judge Goldberg this court held,

> [Such warnings] help ensure that the consent is free, voluntary, and untainted by the arrest's possible illegality. In the instant case the presence of these warnings leads us to conclude that any coercion flowing from the possible illegality of appellant's arrest was dissipated. We therefore hold that the evidence supports

> the conclusion that appellant voluntarily consented to the search of his apartment.

The rule was extended in *United States v. Fike*, 449 F.2d 191 (5th Cir. 1971) to a situation where there were two searches, the first of which was assumed by the court to have been illegal. Evidence discovered during the second search however, was held to be admissible because,

> [T]he voluntary consent of the defendant to the second search, found by the district court and affirmed by this Court, was an independent act sufficient to break the causal connection between the alleged primary illegality and the evidence found as a result of the second search and admitted at trial.

Id. at 193.

The importance of the warning to defendant of his rights in addition to the absence of coercive factors was underscored in *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978). That case involved a search following an illegal stop. The trial court had held that the stop was legal and that consent to the search was voluntary. In reversing this court said,

> When trying to establish that there was a voluntary consent after an illegal stop, the government has a much heavier burden to carry than when the consent is given after a permissible stop.

Id. at 916. The government was unable to point to a sufficient intervening occurrence such as advising the defendant of his right to refuse to permit a search. Under those facts this court concluded that defendant's consent was not voluntarily given and could not operate to remove the effects of the illegal stop.

[2-4] In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) the Supreme Court recognized that voluntariness does not turn on the presence or absence of a single controlling criterion. It is, rather, a question of fact to be determined from the totality of the circumstances. We do not overturn a trial court's holding on this question unless it is clearly erroneous. *United States v. Durham*, 587 F.2d 799 (5th Cir. 1979). The record before us clearly supports the finding that Troutman's consent was freely and voluntarily given, that he had been twice advised of his rights, including the right to refuse consent, and that the search was not the product of coercive conduct. Under the rule of *Bretti v. Wainwright*, *supra*, the search was legal and Troutman's conviction must be affirmed.

AFFIRMED.

MAY TERM — May 11, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIAM GLENN PRICHARD and
BRIAN DE PALMA,
Defendants-Appellants.

Nos. 79-2280
and
79-2281

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS,
Clerk

By /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

AMENDMENT III—SOLDIERS DENIED QUARTER IN HOMES

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Historical Note

Proposal and Ratification. The first ten amendments to the Constitution were proposed to the Legislatures of the several States by the First Congress on September 25, 1789, and were ratified on December 15, 1791. For the States which ratified these amendments, and the dates of ratification, see notes preceding Amendment I.

Notes of Decisions

1. Nature of right

This amendment's prohibition against unconsented peacetime quartering of soldiers protects one aspect of privacy from governmental intrusion. Katz v. U. S., Cal. 1967, 88 S.Ct. 507, 389 U.S. 347, 19 L. Ed.2d 576.

The Housing and Rent Act of 1947, 50 U.S.C.A.App., former §1881 et seq., did not violate this amendment, on ground that it was an incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers on the people. U.S. v. Valenzuela, D.C.Cal.1951, 95 F.Supp. 363.

The right to smoke marijuana is not fundamental to the American scheme of justice necessary to an Anglo-American regime of ordered liberty and is not within "zone of privacy" formed by

penumbras of this amendment, and Amends, 1, 5 and 9. Com. v. Leis, 1969, 243 N.E.2d 898, 355 Mass. 189.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Historical Note

Proposal and Ratification. The first ten amendments to the Constitution were proposed to the Legislatures of the several States by the First Congress on September 25, 1789, and were ratified on December 15, 1791. For the States which ratified these amendments and the dates of ratification, see notes preceding Amendment I.

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United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

[FILED APR 01 1981]

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 79-2280 and 79-2281

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM GLENN PRICHARD
and BRIAN DE PALMA,
Defendants-Appellants.

**Appeal from the United States
District Court for the District of New Mexico
(D.C. No. CR 79-135)**

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Before McWILLIAMS, BARRETT, and SEYMOUR, Circuit Judges.

McWILLIAMS, Circuit Judge.

The central issue in this appeal is whether the search of a Ford Bronco, which resulted in the seizure of 86 pounds of cocaine having an estimated street value of $20,000,000, was lawful.

William Glen Prichard and Brian David De Palma were charged by indictment with possession with an intent to distribute a quantity of cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Prior to trial, the defendants filed a motion to suppress wherein they sought to suppress, among other things, the use at trial of all physical evidence, including contraband, seized by New Mexico state police in a search of the Ford Bronco. After a five-day evidentiary hearing, the trial court denied the motion to suppress. A jury convicted both defendants and each appeals.

As indicated, the hearing on the motion to suppress was an extended one. The transcript of that hearing discloses that on July 29, 1979, at about noon, two New Mexico state police officers established a roadblock on Interstate Highway 40 approximately eight miles east of Moriarty, New Mexico. The stated purpose of the roadblock was to conduct a routine driver's license and car registration check. The officers candidly conceded, however, that if they observed indicia of other crimes during their check of drivers' licenses and vehicle registrations, they intended to enforce the law. The roadblock was conducted with the knowledge and permission of the officers' supervisor. The officers testified that it was their intent to stop all westbound vehicles, except for semi-trucks, which had already been stopped at a port of entry. When the cars began to "pile up," however, the officers would wave all of the stopped

cars through in order to prevent the situation from becoming unduly hazardous. One officer estimated that they would allow no more than ten cars to back up before they waved all of the stopped cars on through. After they cleared the area, the officers would begin to stop cars again.

It was in this setting that at about two o'clock on the afternoon of July 29, 1979, Officer Jeff Faison, one of the New Mexico state police officers, stopped a 1979 Ford Bronco. Prichard was driving the Bronco and De Palma was the only passenger. On request, Prichard produced a valid California driver's license and a temporary registration of the vehicle in California in the name of "R. English." Prichard told Officer Faison that he had borrowed the car to go to a wedding in Memphis, Tennessee. Faison then attempted to make a NCIC computer check in order to determine whether the vehicle had been stolen, but the computer was out of order. Faison asked for the phone number and address of the registered owner, R. English, but neither Prichard nor De Palma gave him any information. Faison then requested, and received, permission to look in the glove compartment of the Bronco for identification. Inside the glove compartment, Faison found a Florida temporary transportation permit, an insurance card, and a warranty plan all made out to a Jack Taylor of Lake Worth, Florida, and a Florida Highway Patrol Inspection form made out to Friendly Ford. Faison also noticed a California license plate lying behind the passenger seat and detected a pungent odor emanating from the rear of the vehicle. Faison asked Prichard what the smell was, and, according to Faison, Prichard "flinched."

Faison then directed the two to stand away from the vehicle, and he called for assistance from his fellow officer. According to the officers, they asked for, and received, consent to search the vehicle. Faison then got into the vehicle and climbed over the seat into the back of the Bronco. There he found a can of rose-scented odorant which had tipped over and formed a puddle. He also noticed several screws laying on the floor carpet and a loose side panel. Faison removed the loose panel and located ten bricks of what he initially believed to be marijuana. A field test, however, revealed that the substance was cocaine. A subsequent search of the Bronco, after it had been towed to a garage, disclosed nine additional bricks of cocaine. In searching the vehicle at the garage, Faison also discovered: (1) a roll of masking tape in an ice chest in the rear of the Bronco, the torn end of which matched the masking tape wrapping on one package of cocaine; (2) a baggie of cocaine, under the carpet of the Bronco on the front passenger side, which matched the cocaine in the nineteen bricks; and (3) a strainer screen, in the console between the seats, which is used to "fluff" cocaine in preparation for use.

It is defense counsel's position that the motion to suppress the use at trial of the physical evidence taken from the car, including the nineteen bricks of cocaine, should have been granted on any one of several grounds. In this regard, the defendants' primary argument is that the roadblock stop of the Bronco violated their Fourth Amendment rights and that the subsequent search of the vehicle was tainted by the illegal stop. The first issue, then, is whether the initial stop of the Bronco was lawful.

Counsel for the defendants relies heavily on Delaware v. Prouse, 440 U.S. 648 (1979), in support of the argument that the roadblock stop of the Bronco was unconstitutional. In our view, *Prouse* does not support the defendants' position. Indeed, Prouse supports the conclusion that the roadblock stop of the Bronco was lawful.

It is true that in *Prouse* the Supreme Court held that absent at least an articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not properly registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. 440 U.S. at 663. The court, however, also expressed the following caveat to the general rule above set forth:

> *This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.* We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. *Id.* (emphasis added). (footnote omitted).

In our view, the roadblock stop of the Ford Bronco does not run afoul of the rule of *Prouse*. While this may

not have been a "100% roadblock" of the type referred to in *Prouse*, it is nonetheless a long way from the selective, single car stop denounced in *Prouse*. In the instant case, the New Mexico state police were attempting to stop all westbound traffic on an interstate highway, insofar as was humanly possible. The decision not to stop trucks was reasonable under the circumstances, because, presumably, they had all been stopped at a port of entry. The purpose of the roadblock, *i.e.*, to check drivers' licenses and car registrations, was a legitimate one. If, in the process of so doing, the officers saw evidence of other crimes, they had the right to take reasonable investigative steps and were not required to close their eyes. *See* United States v. Merryman, 630 F.2d 780, 782-85 (10th Cir. 1980). Furthermore, allowing all the stopped cars through when traffic became congested was also reasonable and, in our view, non-violative of the rule of *Prouse*. In sum, the roadblock stop of the Ford Bronco was, under the described circumstances, constitutional.

In light of our determination that the initial stop of the Bronco was valid, we find the fruit of the poisonous tree doctrine inapplicable. We must, therefore, determine the propriety of the search of the Bronco independent of the initial stop and momentary detention for the purpose of checking the driver's license and registration papers. In this connection, the trial court found, after an extensive evidentiary hearing, that the defendants had voluntarily given the state police their consent to search the vehicle. Not surprisingly, the evidence on the issue of consent was in conflict, but the trial court chose to believe the officers' version of events. To determine and assess the credibility of witnesses is a

prerogative of a trial judge, and not a reviewing court, which never heard nor saw the witnesses. United States v. Petersen, 611 F.2d 1313, 1317 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); United States v. Gibbons, 607 F.2d 1320, 1329 (10th Cir. 1979).

The facts of the instant case bearing on the consent issue have close resemblance to the facts of United States v. Mendenhall, 446 U.S. 544 (1980). There the Supreme Court declared that whether a particular consent was voluntary, or not, is to be determined by the totality of *all* the circumstances. As in *Mendenhall*, the evidence here is plainly adequate to support the trial court's finding that the defendants voluntarily consented to the search.

At the hearing on the motion to suppress, the Government admitted that the search of the Bronco was without the benefit of a search warrant, but insisted that the defendants first prove standing. In an effort to establish standing, the defendants took the witness stand; and in response to certain questions, the defendants attempted to plead the Fifth Amendment. The trial court instructed the defendants to answer the questions or be faced with contempt proceedings. The claim is now made that such violated their Fifth Amendment right against self-incrimination. We fail to see how any possible error in this regard was prejudicial. The statements made by the defendants at the hearing on the motion to suppress were not used against them at trial. Nor did any of their answers serve as a lead for developing other evidence. Counsel asserts that statements of the defendants made at the hearing on the motion to suppress and heard by the judge may

have influenced his judgment in denying defendants' motion for acquittal under Fed. R. Crim. P. 29. Such an assertion is irrelevant. On appeal, the reviewing court makes its own independent judgment as to the sufficiency of the evidence, based on the record as made in the trial court. Counsel also suggests that the trial court may have imposed a heavier sentence than he otherwise would have because of what he learned at the hearing on the motion to suppress. There is nothing in the record, however, to support such a suggestion. If counsel is of the view that the sentences imposed were too harsh, he may, after our mandate has issued, file with the trial court a motion to reduce sentence under Fed. R. Crim. P. 35.

As alluded to above, the trial court denied the defendants' motion for judgment of acquittal and, on appeal, counsel argues that the evidence is legally insufficient to support the jury's verdicts. We view the evidence differently. The defendants were the sole occupants of a vehicle that was being driven cross-country. In the console between the front seats was a strainer screen used to "fluff" cocaine. Under the carpet on the passenger's side where De Palma was seated was a baggie of cocaine which matched the nineteen bricks of cocaine hidden in the rear of the vehicle. Additionally, the torn end of a roll of masking tape located in an ice chest in the rear of the Bronco matched the masking tape wrapping on one of the packages of cocaine. The totality of the evidence certainly permits the jury to infer that the defendants *knowingly* possessed cocaine, and the great quantity of cocaine found in the Bronco permitted the additional inference that the defendants intended to sell and distribute this drug.

See United States v. v. Stricklin, 534 F.2d 1386, 1390 (10th Cir.), *cert. denied*, 429 U.S. 831 (1976).

The defendants also complain that the instruction on aiding and abetting was confusing and, in effect, directed the jury to convict Prichard as a principal. We have examined the instructions, and believe them to be adequate. The jury was of course instructed that they could not convict either defendant unless their individual guilt was established beyond a reasonable doubt.

Finally, counsel asserts that certain error occurred during the trial that denied the defendants a fair and impartial trial. Specifically, it is claimed that the prosecutor made an improper closing argument in pointing out to the jury that defense counsel had failed to establish that which in his opening statement he said he would prove. Such comment, under the circumstances, was not comment on the defendants' failure to testify. When defense counsel, by way of opening statement, advises a jury of what his evidence will be, he invites comment by the prosecutor in closing argument that defense counsel failed to prove that which he said he would. United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970). *See also* United States v. Merryman, 630 F.2d 780, 788. Other alleged instances of trial irregularities have been examined and none is of any moment.

Judgments affirmed.